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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 648

CHAN WING OHEUNG, a k.a BILL WONG, *Petitioner*

v.

FRANK C. HAGERTY, Officer in Charge, U. S. Immigration and Naturalization Service, Providence, Rhode Island, *Respondent.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

PEYTON FORD
1000 Connecticut Avenue
Washington, D. C.
Attorney for Petitioner

Of Counsel:

J. HOWARD MCGRATH
1000 Connecticut Avenue
Washington, D. C.

THOMAS F. VANCE, JR.
210 Main Street
Pawtucket, Rhode Island

FORD, LARSON, GREENE AND HORAN
1000 Connecticut Avenue
Washington, D. C.

[illegible] S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Statement	1
Reasons for granting the rehearing and issuing the writ	2
I.	2
II.	3
III.	5
Conclusion	6
Certificate of Counsel	7

TABLE OF CASES

Calder v. Bull (U.S.), 3 Dall. 386	3
Commissioner of Internal Revenue, Petitioner v. Fred N. Acker, 28 L. W. 4009	4
Galvin v. Press, 347 U.S. 522	3
Marcello v. Bonds, 349 U.S. 302	2, 4
Ogden v. Saunders (U.S.), 12 Wheat. 213	2
Satterlee v. Matthewson (U.S.), 2 Pet. 380	3

STATUTES:

8 U.S.C.	
Sec. 155(c)	5
Sec. 1254	2, 4
62 Stat. 1206	5
66 Stat. 279	5

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Chan Wing Cheung, also known as Bill Woo, prays that this Court grant rehearing of its order of March 7, 1960, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the First Circuit in the above-entitled case as prayed for in the petition filed herein on January 18, 1960.

STATEMENT

The statement of facts contained in this petition is limited to the salient facts which the petitioner considers to be dispositive to the granting of the rehearing

and issuing the writ of certiorari. [See Petition for Writ of Certiorari, pp. 6, 7 for remainder of Statement.]

REASONS FOR GRANTING THE REHEARING AND ISSUING THE WRIT

By denying the writ of certiorari, the Court in this case has adopted the arguments of the respondent, which in its Respondent's Brief in Opposition clouded the main argument advanced by the petitioner in his Petition for Writ of Certiorari. The respondent failed to answer the first argument of the petitioner when it attempted to respond to the three questions presented by the Petition for Writ of Certiorari by posing and answering two questions of its own.

I

The Court should reconsider its position on the application of the ex post facto clause to deportation. The Court should not be content, as it has in the past, to draw the broad conclusion that the ex post facto clause does not apply to deportation without applying a satisfactory rationale for that conclusion.

Title 8, U.S.C., Sec. 1254, the deportation statute to be interpreted in the case, is in the nature of a penal statute which imposes a penalty.[1]

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[1] Justice Douglas stated in *Marcello* v. *Bonds*, 349 U.S. 302, at 320, that:

> "Deportation may be as severe a punishment as loss of livelihood. See Bridges v. Wixon, 326 U.S. 135, 154, 89 L. ed. 2103, 2115, 65 S. Ct. 1443; Delgadillo v. Carmichael, 332 U.S. 388, 391, 92 L. ed. 17, 19, 68 S. Ct. 10. As Mr. Justice Brandeis stated in Ng Fung Ho v. White, 259 U.S. 276, 284, 66 L. ed. 938, 943, 42 S. Ct. 492, deportation may result 'in loss of both property and life; or of all that makes life worth living.'"

Mr. Justice Frankfurter, in his majority opinion in *Galvin* v. *Press*, 347 U.S. 522, 531; 98 L. ed. 912, 922, stated, "And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the ex post facto Clause, even though applicable only to punitive legislation should be applied to deportation." (Footnote omitted) Even if the Court does not accept the persuasive argument advanced by Mr. Justice Johnson in *Ogden* v. *Saunders*, (U.S.) 12 Wheat. 213, 271, 6 L. ed. 606, 625, and in *Satterlee* v. *Matthewson*, (U.S.) 2 Pet. 380, 681; 7 L. ed. 458, 561, which demonstrates that the ex post facto clause should apply both to civil and criminal cases, the Court should establish a rationale to show why the ex post facto clause does or does not apply to deportation. Petitioner believes that the consequences of deportation are of such a nature that deportation cases come under the favorable application of the ex post facto clause as established by *Calder* v. *Bull*, (U.S.) 3 Dall. 386, 1 L. ed. 648.

II

The petitioner believes that the Court should accept the first argument advanced in his Petition for Writ of Certiorari (Pet. Brief 7), since the respondent in its Brief in Opposition fails to answer the argument by making no denial of the fact that the statute, *which is in the nature of a penal statute*, should be interpreted by the reading of "English", instead of "congressional English". The respondent simply states what he thinks the statute means, and fails to respond to the statement of the Court of Appeals "A rigid and literal reading of this rather cumbersome section seemingly supports petitioners's view. . . ." (Pet. App. B, 21). This

Court should ignore the respondent's factual thinking and accept as a conclusion of fact the conclusion of the Court of Appeals for the First Circuit, which states that the petitioner's position would be sustained, if the words of the statute were used to interpret the statute.

The respondent makes no denial of the fact that the words of the statute should be used to interpret the statute. This Court should realize that the respondent fails to deny the fact, since *Commissioner of Internal Revenue, Petitioner v. Fred N. Acker*, 28 L. W. 4009, a recent decision of this Court, states that it is settled law that " 'penal statutes are to be strictly construed' . . . and that one 'is not to be subjected to a penalty unless the words of the statute plainly impose it,' . . .". Title 8, U.S.C. Sec. 1254, the statute to be interpreted in this case, is in the nature of a penal statute, since it imposes a penalty.

As stated in the Petition for Writ of Certiorari, this is a case of first impression. The very nature of this case, which concerns the correct application of a deportation statute and a resulting ex post facto problem, requires the Court to protect the constitutional rights of this petitioner. Justice Douglas stated in *Marcello v. Bonds*, 349 U.S. 302, at p. 320, that:

> "Deportation may be as severe a punishment as loss of livelihood. See Bridges v. Wixon, 326 U.S. 135, 154, 89 L. ed. 2103, 2115, 65 S. Ct. 1443; Delgadillo v. Carmichael, 332 U.S. 388, 391, 92 L. ed. 17, 19, 68 S. Ct. 10. As Mr. Justice Brandeis stated in Ng Fung Ho v. White, 259 U.S. 276, 284, 66 L. ed. 938, 943, 42 S. Ct. 492, deportation may result 'in loss of both property and life; or of all that makes life worth living.' "

Subsection (c) of Section 19 of the Immigration Act of 1917,[2] penalized aliens who remained in the United States after their visas had expired, with a deportation penalty. The penalty was mitigated in subsequent amendments to subsection (c) of Section 19 of the Immigration Act of 1917.[3] A moral alien who satisfied certain conditions could avail himself of such lesser penalties as departing to any country of his choice or receiving a mitigated penalty at the discretion of the Attorney General of the United States.

Section 244 of the Immigration and Nationality Act of 1952, Title 8, U.S.C. Sec. 1254, became law June 27, 1952, in lieu of subsection (c) of Section 19 of the Immigration Act of 1917, as amended, which was repealed on June 27, 1952 (c. 477, Title IV, sec. 403(a)(13), (23), 66 Stat. 279, eff. Dec. 24, 1952). The scope of aliens who could avail themselves of mitigated penalties was enlarged to include criminals, prostitutes, or other immoral persons in addition to the formerly covered moral persons. A different term of years was set up as a basis for determining the degree of penalty mitigation with respect to certain alien types.

III

The petitioner believes that the respondent misled the Court in its Brief in Opposition, by emphasizing the congressional intent rationale, which was advocated by the petitioner only in lieu of the absence of acceptance

[2] Feb. 5, 1917, c. 29, sec. 19, 39 Stat. 889, 8 U.S.C. sec. 155(c) Pet. App. A, p. 1.

[3] June 28, 1940, c. 439, Tit. II, sec. 20, 54 Stat. 671; Dec. 5, 1942, c. 690, 56 Stat. 1044; July 1, 1948, c. 783, 62 Stat. 1206 (Pet. App. A, pp. 1-3)

of his argument that this case presents the necessity of interpreting the statute by the reading of "English", instead of "congressional English".

It should be observed, however, that the petitioner has a case strong enough to win under a correct application of "congressional English". Respondent only tends to imply an incorrect inference in its Brief in Opposition when it states "both S. 2550, which was preferred to the amendment, and the Act as it finally became law grouped overstayed aliens and immoral persons together in the same subsection." (Res. Brief 9). Petitioner points out that overstayed aliens are only grouped together with immoral persons in subsection (5) when the aliens are both overstayed and immoral. A moral alien is covered under subsection (3).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a rehearing be granted in the instant case.

Respectfully submitted,

PEYTON FORD
1000 Connecticut Avenue
Washington, D. C.
Attorney for Petitioner

Of Counsel:

J. HOWARD MCGRATH
1000 Connecticut Avenue
Washington, D. C.

THOMAS F. VANCE, JR.
210 Main Street
Pawtucket, Rhode Island

FORD, LARSON, GREENE AND HORAN
1000 Connecticut Avenue
Washington, D. C.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

PEYTON FORD
Attorney for Appellant.